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THE CY PRES DOCTRINE IN KENTUCKY

Courts look with favor on donations to charitable trusts and liberally construe such gifts. Often a settlor leaves his property in trust to charities but for some reason it is impossible or impractical to carry out his particular purpose. In such a case the court will not allow the gift to fail unless the trust provides for a gift over, or is specifically restricted to the named purpose. The courts base their decision on the theory that the settlor had a general charitable intention, in addition to his particular intention, and give effect to the general intention by applying the gift to a purpose as near the particular purpose as is practicable. This principle is called the doctrine of *cy pres*.¹ Of course, if the language of the donor expressly indicates or is construed to indicate that he wants to carry out the named purpose and no other, then *cy pres* will not be applied.²

Historically, in England,³ the sole requirement for a valid gift was that the donor show a general charitable purpose. If such a general purpose was indicated, the king, as *parens patriae*, by the exercise of his prerogative, would designate the specific purpose to which the gift would be made. Such gifts did not fail for the reason that no particular purpose or method of applying the gift was named; that a person appointed to select the purpose failed to exercise his power; or that the donor himself had reserved the right to designate the charity and had failed to exercise it. In such a case, the chancellor, acting for the king as the king's minister under the sign manual and not as a court of equity, would designate the particular purpose.⁴ This purpose under the prerogative *cy pres* need not be similar to the donor's purpose. Where, however, the beneficiaries of the trust had been designated, in general or collective terms, as the poor in a given county or parish, or when a person had been appointed to select the described portion or kind or number from a designated class, the chancellor, acting as a judicial officer in a court of equity, would sustain the gift as a charitable trust.⁵

The Court of Appeals of Kentucky rejected the English prerogative doctrine of *cy pres* as early as 1836.⁶ Language may also be found in some cases leading to the inference that judicial *cy pres* is also rejected and there has probably been a common impression among lawyers to that effect. It is so stated in *Bogert on Trusts*.⁷ Bogert bases his conclusion on the decision in *Cromie's Heirs v.*

¹ 3 SCOTT, TRUSTS (1939) sec. 399.

² *Bowden v. Brown*, 200 Mass. 269, 86 N. E. 351 (1908).

³ 2 BOGERT, TRUSTS (1935) secs. 431, 432; 3 SCOTT, TRUSTS (1939) secs. 399, 399.1.

⁴ *Da Costa v. De Pas*, 1 Amb. 229, 27 Eng. Rep. 150 (1754).

⁵ See *Moore's Heirs v. Moore's Devises*, 34 Ky. (4 Dana) 354 (1836).

⁶ *Id.* at 366.

⁷ 2 BOGERT, TRUSTS (1935) sec. 433.

*Louisville Orphan's Home*⁸ where the Kentucky Court refused to apply a surplus of a trust fund *cy pres*. It was held there that the surplus should revert to the donor's estate, since the charity designated was a New York charity, limited in the amount of property, real and personal, which it could hold, with all assets over that legal limit becoming the property of the state. This same case, however, quotes with approval from an early Kentucky case:⁹ "And we are satisfied that the *cy pres* doctrine is not and should not be a judicial doctrine, except in one kind of case—where there is an available object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed."¹⁰ It is further stated in the *Cromie Case*,¹¹ referring to the repeal of the English statute of charitable uses, which had been adopted by Kentucky as a part of its common law, that "the only object of the repeal of the British statute, in some respects more local and consistent with British policy, was to substitute a system more congenial with our institutions, and by a legislative indorsement of the doctrine suggested in *Moore v. Moore* . . . to eliminate the *cy pres* doctrine of England. Consequently American charity, properly defined, and judicially upheld and applied, is still a favored nurseling in Kentucky." The present Kentucky statute provides that any gift made "for any charitable or human purpose shall be valid if it points out with reasonable certainty the purposes of the charity and the beneficiaries thereof."¹² Considering this, can it be said that Kentucky does not apply at least to a limited extent the doctrine of judicial *cy pres*?

Generally judicial *cy pres* is applicable in two situations: (a) where the testator indicates a general charitable purpose but fails to designate a specific charitable object; and (b) where the indicated purpose is reasonably specific, but this specific purpose cannot be carried out under the circumstances. Examples of (a) are gifts "to charity" or "to charitable objects." These are classed as "general" since no mention is made of any one of the four principal divisions which are, in the legal sense, included in the word "charity:" namely, trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.¹³ Under the English doctrine and under the doctrine as applied by many of the states in this country, the general charitable intent is sufficient and the courts will apply the gift

⁸ 66 Ky. (3 Bush) 365, 375 (1867).

⁹ *Moore's Heirs v. Moore's Devisees*, 34 Ky. (4 Dana) 354 (1836).

¹⁰ 66 Ky. (3 Bush) 365 (1867).

¹¹ *Id.* at 375.

¹² Ky. R. S. 381.260.

¹³ See *Commissioners For Special Purposes of Income Tax v. Pemsel*, (1891) A. C. 531, 538.

cy pres.¹⁴ Any one of a number of circumstances may require the application of (b), some being where conditions which existed at the time the testator executed his will have changed and the funds are not sufficient to meet the financial needs of the charity; or where the specific charity designated to receive the funds or property has ceased to exist; or where specific realty is given to the charity to be used in a designated way only and it becomes impracticable or impossible to continue to use it in that way. In disposing of property of this class, judicial *cy pres* will find some purpose similar to the original purpose and apply it in that manner.

To what extent will Kentucky apply judicial *cy pres*, as in (a), above, where only a general charitable purpose is evidenced? Apparently in such a situation Kentucky will not apply the *cy pres* doctrine and the gift will fail since a general charitable purpose alone does not meet the requirement of definiteness. Thus a gift to charitable institutions where the donees are to be designated according to the trustee's judgment will fail.¹⁵ Also declared to be invalid was a devise as follows: "everything else I own goes to charity. I leave that to my brother Sam to give out,"¹⁶ since the power granted to the brother cannot be carried out. In another case,¹⁷ the testator, after making certain specific gifts to charity, directed that his executor should dispose of the residue of his estate "according to his judgment for good and charitable purposes." The Court, in holding the gift invalid, said: "No peculiar or particular person, or class of persons, is pointed out as the recipient." A devise "for charitable objects to be expended in this Diocese of Louisville, according to his (the executor's) discretion" was void because of uncertainty, the court stating that such a provision amounted "to nothing more than a power of attorney to make a will for the testator."¹⁸ From the decisions in the above cases, it is evident that in order to be upheld as a charitable gift in Kentucky, the testator must state something more than a general charitable purpose, since the court will not invoke judicial *cy pres* in aid of such a gift, and the power granted to an executor to select the charity is void.

Instances of charitable trusts which the Kentucky Court has found to meet the requirement of definiteness of purpose and beneficiaries are numerous. In all of these, in addition to showing a general intent, the testator has narrowed his object, at least to the extent of specifying one of the principal divisions of charitable

¹⁴Minot v. Baker, 147 Mass. 348, 17 N. E. 839 (1888); In re Jordan's Estate, 329 Pa. 427, 197 Atl. 150 (1938); Anonymous, 2 Freem. Ch. 261, 22 Eng. Rep. 1197 (1702).

¹⁵Gooding et al. v. Watson's Trustee, 235 Ky. 562, 31 S.W. 2d 919 (1930).

¹⁶Simmon's Ex'r. et al. v. Hunt et al., 171 Ky. 397, 188 S. W. 495 (1916).

¹⁷Gerick's Ex'r. v. Gerick, 158 Ky. 478, 165 S.W. 695 (1914).

¹⁸Spalding et al. v. St. Joseph's School for Boys of the City of Louisville, 107 Ky. 382, 441, 54 S.W. 200 (1899).

purposes. Thus a gift to an orphan's home was applied *cy pres* for the State Welfare Department at the outset, the home in its corporate entity having ceased to exist before the testator's death and the administration of the home having been taken over and continued by the Welfare Department.¹⁹ A gift in trust "to assist aged unmarried women, preferably teachers" was sufficiently definite,²⁰ as was a devise to the testator's executor to be distributed "to the poor in his discretion."²¹ Further, a gift "to such charitable institutions as may appear most useful in disseminating the Gospel at home and abroad," with discretionary power in the trustees as to the particular object and method, was sufficiently definite,²² while a gift to the use of "a public seminary" has been applied to a seminary in the same county, even though the latter was not in existence at the time of the testator's death, nor was the fund sufficient to establish such a seminary.²³ Finally a gift for the purpose of educating poor orphans of the county was valid.²⁴ In view of these decisions, it can apparently be said that judicial *cy pres*, as in (b), is applied in Kentucky, and it would appear that when the Court is applying the statute²⁵ that it is in substance applying judicial *cy pres*.

Kentucky has applied judicial *cy pres* without exception where the charitable trust was valid at the outset, but because of changed conditions and circumstances the original charitable purpose has subsequently failed. The courts are assisted in these cases by a statute²⁶ which grants a court of equity the power to order the sale of property held in trust for a charity and its reinvestment for the same general purposes. In one instance, where the trust income subsequently became insufficient for the continued operation of a school for needy girls, the court directed that a plan be formulated for the application of the trust funds, after the sale of the land, to the same general purpose.²⁷ In another case, funds given originally for the maintenance of scholarships in a designated school were permitted to be used for scholarships in a school of the same religious faith in another county.²⁸ In still another instance, trustees were authorized to sell land held in trust for school purposes and the proceeds trans-

¹⁹ Kentucky Children's Home, *Lyndon v. Woods*, 289 Ky. 20, 157 S.W. 2d 473 (1941).

²⁰ *State Bank & Trust Co. v. Patridge*, 198 Ky. 403, 248 S.W. 1056 (1923).

²¹ *Thompson's Ex'r. v. Brown*, 116 Ky. 102, 75 S.W. 210 (1903).

²² *Attorney General v. Wallace's Devisees*, 46 Ky. (7 B. Monroe) 611 (1847).

²³ *Curling's Adm'r. v. Curling's Heirs*, 38 Ky. (8 Dana) 38 (1839).

²⁴ *Moore's Heirs v. Moore's Devisees*, 34 Ky. (4 Dana) 354 (1836).

²⁵ Ky. R. S. 381.260.

²⁶ Ky. R. S. 273.140.

²⁷ *Pennebaker v. Pennebaker Home for Girls*, 297 Ky. 670, 181 S.W. 2d 49 (1944).

²⁸ *Scott-Lees Collegiate Institute v. Charles et al.*, 283 Ky. 234, 140 S.W. 2d 1060 (1940).

ferred to a city school board to be used in the construction of a school building, the land having become unsuited for school purposes.²⁹ And again, where local prejudice prevented the successful continuance of a school for negroes, the court consented to the sale and application of the trust funds for the same purpose in a more favorable location.³⁰

In Kentucky, as in other jurisdictions, *cy pres* will not be applied when the testator's purpose is absolutely definite as to the beneficiary and this definite purpose cannot be accomplished. This may account for the failure of the trust in *Brewer v. Baxter's Ex'r*.³¹ In that case the income was to be paid by the trustees "to the governing authorities" of the Church of Christ. No such central governing authority existed in that church although there were numerous individual churches of the same name and faith in Kentucky. In declaring the gift void, the court said that although it would apply gifts *cy pres* to kindred objects when such objects exist, that in the instant case no such kindred object existed or was available, and that the court itself could not supply an object for the trust. In so holding the court must have decided that some central governing authority was the intended object of the trust and not the advancement of the particular religion or else that the trust failed for indefiniteness. This decision points to the fact that if the donor desires to establish a trust for the advancement of a particular religious denomination and the particular unit to which the funds are to be paid fails, there must exist some central organization capable of receiving the funds and of carrying out the object.

In conclusion, it can be said with reference to the application of *cy pres* in Kentucky that: (1) where the donor indicates a general charitable purpose only, that the gift will not be applied *cy pres* and the gift will fail; (2) where the donor indicates in addition to his general charitable purpose a particular purpose, judicial *cy pres* will be applied and the gift will not fail; (3) where once a charitable trust has been established and its purpose subsequently fails, Kentucky without exception will apply the fund *cy pres*; (4) where the donor indicates an absolutely definite purpose and none other, Kentucky will not apply the doctrine of *cy pres* and the gift will fail.

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²⁹ Board of Trustees of Madison Academy v. Board of Education of the City of Richmond, 282 Ky. 671, 139 S.W. 2d 766 (1940).

³⁰ Hill v. McGarvey, 14 Ky. Law Rep. 101, 19 S.W. 56 (1892).

³¹ 295 Ky. 416, 174 S.W. 2d 698 (1943).